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Supreme Court of the United States

OCTOBER TERM, 1948

No. 671

SAMUEL TITTO WILLIAMS,
Appellant-Defendant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellees-Plaintiffs.

BRIEF FOR APPELLANT-DEFENDANT

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April 1, 1949.

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(1) Due process of law under the 14th Amendment includes as indispensable elements in a capital case, the right of a defendant to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

(2) Since such rights are essential elements of due process of law under the 14th Amendment, a defendant in a capital case is entitled to be protected in them against *any agency* of the State authorized to deprive him of his life, and *at the point* at which such deprivation is authorized and undertaken.

(3) Where, as here, the statutes of a State authorize the trial judge in a capital case to disregard the jury's recommendation of a life sentence and to sentence an accused to death, such statutes must also require that the trial judge observe such rights *in connection with such sentence of death*, if such rights are to have any substantial meaning *at the only point* at which the State has, in fact, undertaken to deprive appellant of his life.

(4) The statutes of the State of New York, here involved, are therefore repugnant to the due process clause of the 14th Amendment, since the Court of Appeals of that State has construed such statutes

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as authorizing the trial judge, on sentence, to deprive appellant of his life on the basis of information obtained by the judge after verdict, from witnesses as to whom appellant was afforded no right of cross examination or rebuttal, nor the confrontation necessary for such purposes.

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Supreme Court of the United States

OCTOBER TERM, 1948

SAMUEL TITTO WILLIAMS, *Appellant-Defendant,* *vs.* THE PEOPLE OF THE STATE OF NEW YORK, *Appellees-Plaintiffs.*	No. 671

BRIEF FOR APPELLANT-DEFENDANT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

May it please the Court:

This is an appeal by the appellant-defendant, Samuel Titto Williams, from the judgment of the Court of Appeals of the State of New York of January 6, 1949, affirming the judgment of the County Court of Kings County, State of New York, of March 2, 1948, convicting said appellant of felony murder in the first degree and sentencing him to death.

On February 23, 1949, the Honorable Wiley Rutledge, Associate Justice of this Court, entered an order allowing appellant to appeal to this Court from said judgment, and a stay of execution pending the consideration and final determination of such appeal.

Opinions Below

There was no opinion by either the Court of Appeals or by the trial court, the County Court of Kings County.

The amended remittitur (R. 21-22) of the Court of Appeals to the County Court of Kings County affirming the judgment of conviction of that Court contains, however, the following recitals:

> "Judgment of conviction of the County Court, Kings County, appealed from in this action, be and is hereby in all things AFFIRMED.
>
> Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that, as construed, Sections 1044, 1045 and 1045A of the Penal Law and Section 482 of the Code of Criminal Procedure of this state violate the Fourteenth Amendment of the Constitution of the United States in that they sanctioned or permitted the sentence of death to be based upon information supplied by persons with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal; this court held that neither the statutes nor the sentence aforesaid violated the Fourteenth Amendment of the Constitution of the United States."

Such amended remittitur is reported at 298 N. Y. 863.

Jurisdiction

This being an appeal from a judgment of the Court of Appeals, the highest court of the State of New York in which a decision could be had, in which Court there was drawn in question and necessarily passed upon the validity

of certain statutes of the State of New York, to wit, Sections 1044, 1045 and 1045-a of the Penal Laws of the State of New York and Section 482 of the Code of Criminal Procedure of the State of New York, as allegedly repugnant to the 14th Amendment to the Constitution of the United States, and the decision of said Court being in favor of the validity of such statutes, the jurisdiction of this Court is invoked under Section 1257(2), Title 28, U. S. C.

The statutes of the State of New York, the validity of which are so involved on this appeal, are set out as Appendix A to this brief.

Statement of the Case

In this case the Court of Appeals of the State of New York construed the statutes of that State, hereinbefore specified, as permitting the trial judge in the County Court of Kings County, New York, before whom and a jury of said court appellant was tried and convicted of felony murder in the first degree, to disregard the jury's recommendation of life imprisonment and to sentence appellant to death on certain grounds specifically stated by the trial judge. These grounds appear verbatim in the transcript of record on this appeal to this Court (R. 12-20), and are there indexed under the designation "Proceedings on Sentence." The more pertinent portions will presently be quoted in this Statement of the Case. It seems advisable, however, first to set out briefly their general nature.

As appears from such portion of the record, the trial judge avowedly disregarded the jury's recommendation of life imprisonment and sentenced appellant to death on the basis of information received by such judge in the absence

both of appellant and of his counsel, from probation reports and from *ex parte* statements of probation officers and other persons to said judge, which information he expressly states could not legally have been presented in evidence before the jury, and some of which he himself had excluded when offered before the jury by the State.

Such information, as there shown, includes accusations, based on hearsay unsworn statements of various persons with whom appellant was not confronted and as to whom he was afforded no opportunity for cross examination or rebuttal, that appellant had been guilty of other crimes. None of such alleged crimes, it is particularly to be noted, would constitute capital offenses, and, therefore, even had appellant in fact been convicted of any of them, he could not have been subjected to the penalty of death for the commission of any of them. There is not a word of evidence, however, either before the judge or before the jury, that appellant had ever been convicted of any such alleged crimes. Moreover, there is no evidence to contradict the only information in the record in this respect (R. 2), that appellant had never been convicted of any crime.

As there further appears, the Judge stated his belief that had it been legally possible to permit the information, thus received by him *ex parte*, to be presented to the jury, the jury would not have made its recommendation of life imprisonment, and that on such basis, and on the basis of the judge's own conclusion that the appellant had been guilty of such alleged other crimes, the judge undertook to disregard the jury's recommendation and to sentence appellant to death.

The following are verbatim excerpts from the statements made by the trial judge on sentence as to the un-

sworn information received by him *ex parte*, which information he specifically recognizes was not admissible before the jury, but on the basis of which he avowedly disregarded the jury's recommendation of life imprisonment and sentenced the appellant to death. In order to indicate the pertinence attributed by the judge to such information, it has been necessary to include brief excerpts of certain other matters referred to by the judge, which are, in part at least, based on evidence of record before the jury. In order to indicate such matters as are, in any degree, based on evidence so of record, the excerpts referring to them have been placed in brackets. All other matters excerpted are based wholly on information obtained *ex parte* by the judge.

Excerpts from Statements made by Trial Judge at Time of Sentence (R. 12-20).

"The Court: The Defendant, Samuel T. Williams, also known as Tito Williams, was convicted of Murder in the First Degree, with a recommendation of life imprisonment, on January 22, 1948. (R. 12)

Counsel have moved to set aside the verdict of the jury as against the weight of the evidence, and for other reasons urged by them. They have also requested the Court to accept the recommendation of the jury in the event the motion is denied. (R. 12)

* * *

Many material facts concerning the defendant's background could not, because of the rules of evidence, be brought to the attention of the jury, which heard the testimony involving the murder of Selma Graff. (R. 12-13)

I believe it is important to consider some of the evidence, in the light of facts brought to the attention of the Court as the result of investigation by our Probation Department,

and through other sources, for the purpose of considering the jury's recommendation. (R. 13)

[The defendant has been found guilty of striking and killing Selma Graff with an iron bar in the course of burglarizing the ground-floor apartment at 143 East 96th Street, Brooklyn, New York, where she resided with her widowed mother and her young brother, Donald, who is nine and a half years of age.] (R. 13)

* * *

The defendant's entrance into the Graff home was the result of experience he had had on thirty other burglaries in and about the same vicinity for a period of about two months prior to the murder of Selma Graff. He was well schooled in entering homes for the purpose of burglaries, and despite his youth, was a veteran at this type of crime. It was only due to excellent policework coupled with force of circumstances which finally led to his apprehension. In fact, when he was apprehended, no one had any thought that he was in any way connected with the Selma Graff killing. The police were on the look-out for a "night burglar" who had committed approximately thirty burglaries in that vicinity over a period of two months. Seventy-five detectives had been assigned just for the purpose of apprehending the person or persons involved, and it was their impression, based on the manner in which each of the burglaries had been committed, and the fact that a ground-floor apartment was involved in each instance, that in apprehending the person involved in one of these burglaries, they would in all probability have the one who had committed all of them. (R. 14-15)

[Sometime during the early morning hours of September 8, 1947, as a result of information that a prowler was in the vicinity, various detectives and radio patrol cars converged toward a central point at one of the streets in Brownsville and practically ringed that area with radio patrol cars and plain-clothesmen. They arrived within two

minutes after receipt of this information. Detective Cullen saw the defendant emerging from a cellar areaway] and when he approached him and asked him what he had been doing there, the defendant said he had been urinating. Upon examination, no such evidence was found, and the suspicions of the police were sufficiently aroused to take the defendant into custody. [He was taken to the place where he was residing] and there the police officials found about eighteen pawn tickets and personal property which had been reported stolen by various individuals in that vicinity. (R. 15)

[He was then taken to the 73rd Precinct and questioned about these burglaries.] During that interval, individuals who had filed complaints with the police were brought to the Precinct and either identified some of the property which had been found in the defendant's room, or actually identified the defendant. (R. 15)

* * *

[He claimed that police brutality had forced these confessions from him and as evidence of that, exhibited certain scars on his elbow, testifying that these had been caused by blows of the butts of guns held by detectives and from cigarette burns.] (R. 16)

It is interesting to note that the medical chart obtained from the United States Navy, *which information was not permitted into evidence,* discloses that at the time of defendant's discharge, which was before the date of this crime, he had a one-inch scar on the left forearm near the elbow as well as other scars. This chart would therefore indicate that the defendant had this and other scars before he even committed the instant crime, and his testimony concerning police brutality, as well as other testimony, which he glibly stated on the witness stand to be the truth was in fact made up from the whole cloth, and was merely used by him in an attempt to hoodwink the jury. (R. 16)

The probation report indicates that the defendant is a psychopathic liar and his personality is permeated with psychosexual habits of thought and conduct. According to the testimony of the defendant, he was a boarder of Miss Yvonne Ah Lum and only paid one week's board. The rest of the time he was kept by Mrs. Ah Lum and Miss Davenport, the woman who lived with Mrs. Ah Lum. He further stated to police that on various occasions he brought different men into the apartment for the purpose of having sexual relations with these two women. (R. 16)

There was information from Detective Werner that while the defendant was in the uniform of the United States Navy, he observed him using a camera at one of the public schools in the Brownsville area, to take photographs of private parts of young children. (R. 16)

We have the case of Rose Spector whose apartment was burglarized by the defendant on August 27, 1947, at about two a.m., and who identified one of the watches found in the defendant's room by the detectives at the time he was apprehended, as a watch that had been stolen from her apartment on that date. She says that she was awakened by someone pulling the bedsheet from under her and flashing a flashlight in her face, and when the defendant saw that she had been awakened, he ran away. *The defendant stole a wristwatch and a wallet containing some money from her apartment, and admitted this crime to the detectives. He also showed the police where he had discarded the wallet which was recovered. Miss Spector positively identified the defendant as the one in her apartment at two a.m. on August* 27, 1947. (R. 16-17)

We also have the situation involving the Goldiner family who resided in the ground-floor apartment at 145 Legion Street, about two weeks before his arrest, at about two a.m. At that time, their seven-year-old daughter was asleep alone in a rear room, the parents being in another room. *The child says that she was awakened when she felt someone twisting her feet. She says that the lower part of her pajamas had been taken off and the defendant placed himself*

on top of her and placed his penis between her legs. He had one of his hands over her mouth to prevent her from making any outcry. He then arose, and as he was buttoning his pants, she made an outcry which frightened the defendant, who ran out of the apartment. The mother of the child says that she found evidence of discharge on the bed of the child. *The child also positively identified the defendant as the one who perpetrated this act.* (R. 17)

The gross proceeds of the many burglaries committed by the defendant total approximately $5,000. In his room at 122 Sutter Avenue, stolen property was found, as I have indicated before, including fifteen ladies' and men's rings, three ladies' wrist-watches, one man's wrist-watch, about eighteen pawn tickets, three coin banks, which had been forced open, pornographic pictures, and a large hunting knife. Some of the pawn tickets were in the defendant's name and others were in the name of one Alberta Davenport, who lived at the same premises and who said that the defendant had given her the property to pawn. The defendant claimed that all of the stolen property found in his room was either won by him in crap games or bought by him from different men unknown to him, for various sums of money. (R. 17).

There is no point in continuing any further into the defendant's background and experience as a full-time burglar. He perfected what he thought was a foolproof method of earning a living in an easy way. Like others of this kind, however, he finally found himself in a situation not to his liking, and decided to destroy whatever was in his way to a continued success in the criminal career chosen by him. It is unfortunate that his path was blocked by this young girl who showed such bravery, in the protection of her life. There was no reason for the wanton destruction of the life of this young girl. (R. 17-18)

* * *

The defendant, when he testified, showed himself to be a glib, slick, calculating type of individual. His ideas, as

revealed by our probation report, revolve around a morbid sexuality, and he is emotionally unstable, unconcerned and suffers from no remorse whatsoever. *He is deemed by our probation department to be a menace to society.* (R. 18)

It is unfortunate in a trial in this nature that the jury, once it has decided upon a verdict of guilty of murder in the first degree, is not permitted to receive other evidence, which although not permissible as legal evidence in the trial itself, could be used by it in determining whether or not it would recommend life imprisonment. The Court is convinced that the defendant's glibness did help him to the extent of obtaining a recommendation from the jury, *and had they been fully cognizant of all the facts, there would have been no such recommendation.* (R. 18)

I have given this matter grave and serious consideration and have searched for any facts which would justify the acceptance of the jury's recommendation. *My purpose in revealing the defendant's background was to indicate some of the facts which the Court has taken into consideration, in weighing the recommendation of the jury.* I regret that I found nothing in his favor and my conscience would not permit me to give him any consideration of this nature. *The record of the defendant stamps him as a dangerous criminal and I find no basis whatsoever on which I can extend to him, in good conscience, the consideration which the jury has recommended.* To adopt such a recommendation would be tantamount to a challenge to law and order in our community. (R. 18-19)

The People of the State should not be burdened with the responsibility of taking care of this defendant for the remainder of his natural life, and he deserves no merciful consideration by the Court. He must pay the extreme penalty for his brutal murder of an innocent young girl and the injuries he inflicted upon her young brother. The grief which the defendant's acts brought, not only upon the family of the deceased, but upon his own family, is appalling beyond description. (R. 19)

Whether or not a Court should follow the recommendation of a jury in a case of this kind is by no means an easy matter to determine. There are many factors that enter into the resolution of the problem thus presented. I have given everyone of those factors its proper weight and due consideration, and it is only after such careful weighing and deliberation that I have come to the conclusion that this is an instance in which the best interests of society would not be served by following the recommendation of the jury. *If, indeed, this defendant is, in the language of our Probation Department,* a "menace" to our society, *and I believe that he is* such a menace, *it is the duty of the Court to consider the recommendation of the jury in the light of that fact and the various other facts* brought to the attention of the Court *for the first time. Many of these facts—indeed the greater portion of them—while extremely relevant on this question, were not relevant to the issue tried before the jury.* For that reason, undoubtedly, the jury made the recommendation that it did. *I am fully convinced, however, that if this jury had before it the facts contained in the probation report, the recommendation would never have been made. It would stultify my conscience to adopt the recommendation under such circumstances.* It is not without hesitation that I have reached this conclusion, but having reached it, I am now convinced of its absolute justice and inevitably. (R. 19-20)

I must therefore deny the motion to set aside the verdict and to refuse to accept the recommendation of the jury for life imprisonment as embodied in its verdict." (R. 20) (italics supplied)

The foregoing statements by the trial judge, himself, show:

(1) That the trial judge implicitly recognized that the evidence before the jury warranted the jury in recommend-

ing that appellant be sentenced to life imprisonment, instead of death.

(2) That the grounds upon which the trial judge expressly states that he felt compelled to disregard the jury's recommendation and to sentence appellant to death, are based solely on information, obtained by him ex parte, *concerning matters, evidence of which he expressly recognized, was inadmissible before the jury.*

(3) That, therefore, the trial judge undertook to deprive appellant of his life, on sentence, on the basis of information received by him ex parte *after verdict, concerning matters concededly inadmissible before the jury, although the trial judge implicitly recognizes that the jury was justified, on verdict, in refusing to deprive appellant of his life, and in recommending that he be sentenced to life imprisonment, on the basis of evidence before the jury as to which appellant had been afforded the right of cross-examination and rebuttal.*

(4) It seems, therefore, undeniable that the State of New York has by statute here undertaken to deprive appellant of his life, solely on the basis of information obtained by the trial judge after verdict, from witnesses as to whom appellant had been afforded no right of cross-examination or rebuttal, nor any such confrontation as would be essential for such purposes.

Specification of Assigned Errors Intended to be Urged

1. The said Court of Appeals erred in its decision that the statutes of the State of New York, hereinbefore specified, construed by the said Court of Appeals to permit the

Trial Judge to disregard the jury's recommendation of a life sentence and to sentence defendant to death, on the basis of evidence of witnesses with whom accused has not been confronted, and as to whom accused has been afforded no opportunity for cross-examination or rebuttal, are valid and are not repugnant to the 14th Amendment to the Constitution of the United States.

2. The said Court of Appeals erred in failing to decide that such statutes are invalid and repugnant to the 14th Amendment to the Constitution of the United States, unless construed to limit the right of the Trial Judge to disregard the jury's recommendation of a life sentence and to sentence defendant to death, either on the basis of evidence already of record at the time of the jury's verdict, or if on the basis of evidence subsequent to the jury's verdict, only where accused is confronted before the Trial Judge with witnesses giving such testimony and is afforded opportunity for cross-examination and rebuttal.

3. The said Court of Appeals erred in affirming the judgment of conviction and sentence to death of defendant in the County Court of Kings County, based on the foregoing construction by the said Court of Appeals of such statutes of the State of New York, and in its decision that, so construed, such statutes, and sentence under them, are valid and not repugnant to the 14th Amendment to the Constitution of the United States.

Summary of Argument

Argument for appellant will be directed primarily to the following propositions:

1. That the statutes of the State of New York here involved, in undertaking to authorize a trial judge in a felony murder case, to disregard the jury's recommendation of life imprisonment and to sentence appellant to death, on the basis of information supplied by persons as to whom appellant had been afforded no opportunity for cross-examination or rebuttal, and with whom he had not been confronted even to the limited extent necessary for such purposes, are repugnant to the express provisions of the 14th Amendment to the Constitution of the United States that

> "* * * nor shall any State deprive any person of life * * * without due process of law."*

2. That for this Court so to hold will not conflict with anything *in the majority opinions* in the cases of *Adamson* v. *California*[1], *Palko* v. *Connecticut*[2], *Twining* v. *New Jersey*[3], *Maxwell* v. *Dow*[4], *Boyd* v. *United States*[5], *Hurtado* v. *California*[6], *Walker* v. *Sauvinet*[7], or the *Slaughter House Cases*[8].

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*This does not involve any contention that such statutes may not validly give the trial Judge, as they have been construed to do in *People* v. *Cole*, 285 N. Y. 838, discretion to disregard the jury's recommendation of a life sentence and to sentence an accused to death, where such discretion is exercised on the basis of evidence received before verdict, and as to which accused has been accorded both the right of cross-examination and rebuttal.

[1]332 U. S. 46.
[2]302 U. S. 319.
[3]211 U. S. 78.
[4]176 U. S. 581.
[5]116 U. S. 616.
[6]110 U. S. 516.
[7]92 U. S. 90.
[8]16 Wall. 36.

3. That, on the contrary, *consistently with the very bases of the majority opinions in the cases cited*, the statutes of the State of New York here involved, should be held repugnant to the due process clause of the 14th Amendment.

4. That, *consistently with the majority opinions* in the cases cited, the statutes of the State of New York here involved, should be held further repugnant to the 14th Amendment, as abridging appellant's privileges and immunities as a citizen of the United States.

5. That to hold that the probation provisions of the statutes of the State of New York here involved are repugnant to the due process clause of the 14th Amendment, when applied, as here, to a *capital sentence*, is not necessarily to hold that such provisions would be so repugnant when applied to a *non-capital sentence*, but that even should the first holding necessarily involve the second, this would not warrant this Court in refusing to recognize the invalidity of such State statutes where, as here, applied to a capital sentence.

Reply to Suggestions Made by Certain Members of the Court on Application for Stay of Execution

At the time counsel made application to individual members of the Court for leave to appeal and for stay of execution in these proceedings, he was met by two principal objections:

First: It was said that under the majority opinion of the Court in *Adamson* v. *California*, 332 U. S. 46, the statutes of the State of New York could not be held re-

pugnant either to the "privileges and immunities" clause, or to the "due process" clause, of the 14th Amendment.

Second; It was said that to hold, in this case, that the probation provisions of the statutes of New York, here involved, are repugnant to the 14th Amendment, would be to invalidate not only such provisions of the New York statutes, but all State and Federal statutes making similar provisions.

Counsel for appellant desire to reply to these suggestions as a preliminary to the basic Argument of appellant's case. Such reply will inevitably involve some discussion of certain propositions likewise germane to such basic Argument.

A. *The Statutes of New York, Here Involved, Are Repugnant to the 14th Amendment Even Under the Majority Opinions in* Adamson *v.* California, *332 U. S. 46, and the Prior Majority Opinions There Relied On.*

I

Assuming that the term, "due process of law", as used in the 14th Amendment, includes the right of an accused in a criminal case to cross-examination and rebuttal of witnesses against him, and to such limited confrontation as is necessary for these purposes,* a State may not, by statute, authorize a judge on sentence, any more than a jury on verdict, to deprive an accused of his life on the basis of evidence as to which an accused has been afforded no such right of due process.

*The validity of this assumption will later be shown in the Argument, herein, pp. 31 et seq.

II

An accused is entitled, under the 14th Amendment, to be protected against deprivation of life without due process of law by *any agency of a State*[9]. Obviously a trial judge in a State court constitutes an agency of the State.

III

An accused is entitled, under the 14th Amendment, to be protected against deprivation of life without due process of law, *at every stage of judicial proceedings*,[10] including the constitution of the court,[11] the trial before a jury,[12] *the sentencing by a judge*,[13] and the action of an appellate court.[14]

IV

An accused is particularly entitled to such protection at the point in judicial proceedings where the deprivation of life actually takes place. There can be no question that in this case such point was in the proceedings by the trial judge on sentence, since while the verdict of the jury found the appellant guilty, that very verdict expressly refused to deprive the appellant of his life.

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[9] *Buchalter* v. *New York*, 319 U. S. 427, 429; *Brown* v. *Mississippi*, 297 U. S. 278, 286; *Mooney* v. *Holohan*, 294 U. S. 103, 112, 113; *Hebert* v. *Louisiana*, 272 U. S. 312, 316.

[10] *Adamson* v. *California* (Frankfurter, J.), 332 U. S. 46, 67, 68; *Morgan* v. *U. S.*, 304 U. S. 1, 19, 20; *Frank* v. *Mangum*, 237 U. S. 309, 331, 332.

[11] *Tumey* v. *Ohio*, 273 U. S. 510.

[12] *Moore* v. *Dempsey*, 261 U. S. 86.

[13] *Townsend* v. *Burke*, 334 U. S. 736, 740, 741.

[14] *Cole* v. *Arkansas*, 333 U. S. 196, 201, 202.

V

In view of the clear and repeated intimations in majority decisions of this Court that the right of trial by jury is neither a privilege nor immunity of a citizen of the United States, nor an essential part of due process of law under the 14th Amendment, and that therefore a state may by statute abolish trial by jury,[15] the right of an accused to be protected against deprivation of life without due process of law, in connection with a sentence by a judge, becomes of peculiar importance in a state court.

VI

There is nothing in the foregoing grounds upon which appellant claims that the statutes here involved would deprive appellant of his life both without due process of law and in violation of his privileges and immunities as a citizen of the United States, within the meaning of the 14th Amendment, which is in conflict with the meaning attributed to either of those terms in the majority decisions of this Court heretofore specified.

VII

Collectively, such majority decisions of this Court taken at their strongest hold:

(1) That the term "due process of law" as used in the 14th Amendment, has essentially the same meaning as when used in the 5th Amendment, and that in both amendments it must be construed to exclude, or at

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[15] *Palko* v. *Connecticut*, 302 U. S. 319, 324, 325; *Maxwell* v. *Dow*, 176 U. S. 581, 602, 603; *Walker* v. *Sauvinet*, 92 U. S. 90, 92, 93; *Hurtado* v. *California*, 110 U. S. 516, 533.

least not to include as such, the other specific rights enumerated in the first 8 Amendments, including the 5th Amendment itself, since otherwise that term would be mere "surplusage".[16]

(2) That the specific rights enumerated in the first eight Amendments do not, as such, constitute the privileges and immunities of citizens of the United States within the meaning of the 14th Amendment, because those rights are not by the terms of the first eight Amendments confined to citizens of the United States but extend to *all persons*, whether citizens of the United States or not.[17]

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[16] *Adamson* v. *California*, 332 U. S. 46, pp. 53, 54, 66, 67; *Palko* v. *Connecticut*, 302 U. S. 319, 323; *Twining* v. *New Jersey*, 211 U. S. 78, 100, 101; *Hurtado* v. *California*, 110 U. S. 516, 534, 535.

The doctrine that the term "due process of law", would be mere surplusage unless construed to exclude those specific rights enumerated in the 5th Amendment and in others of the first 8 Amendments, seems first to have been enunciated by Mr. Justice Matthews in the *Hurtado* case, p. 534. See also Mr. Justice Frankfurter in the *Adamson* case, pp. 66-67. Counsel submit, however, that by construing the term "due process of law", both in the 5th and 14th Amendments, as including *as minima* those rights specified in the first 8 Amendments, and *as extending in addition* to such new rights as developing social and political concepts may come to recognize, would make that term neither "superfluous", as suggested by Mr. Justice Matthews, nor "mere shorthand", as suggested by Mr. Justice Frankfurter.

[17] *Maxwell* v. *Dow*, 176 U. S. 581, 595, 596.

The reasoning in the *Maxwell* case in this respect would seem to be inverted. It would seem that the rights enumerated in the first eight Amendments were recognized to be so fundamental that they should be extended to *all persons*, citizens or not. To conclude, as does the *Maxwell* case, that by extending them to *all persons*, it was intended to exclude them as privileges or immunities of citizens of the United States, would seem essentially to confine the privileges or immunities of citizens of the United States to such rights as are not so fundamental as to require their extension to all persons.

VIII

Since the right of an accused to cross examine and rebut the testimony of witnesses against him is not a right specifically enumerated in any of the first eight amendments, it is not therefore, even under the most extreme interpretation of the doctrine of such majority decisions, a right excluded from the meaning of the term "due process of law", as used either in the 5th or the 14th Amendments.

IX

Moreover, the right of an accused to be confronted by witnesses against him, at least to the limited extent essential to the effective exercise of the right of cross-examination and rebuttal, is not necessarily synonymous or co-extensive with the right of confrontation specifically conferred on *all persons by the 6th Amendment. Therefore despite the enumeration of the possibly broader right in the 6th Amendment, such limited right of confrontation might, consistently with the foregoing doctrine of such majority decisions, be within the meaning of "privileges or immunities of citizens of the United States" as used in the 14th Amendment.**

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*It is to be noted that Wigmore on Evidence, Volume V, § 1397 (Third Edition) seems to consider the right of cross-examination as constituting the full privilege of confrontation conferred by the 6th Amendment. However, see § 1367 and § 1365, *idem*, quoted, *post.*, pp. 39, 40.

It is particularly to be noted that appellant here does not primarily rest his case on the right of confrontation as a privilege or immunity of citizens of the United States under the 14th Amendment, but rather on the right of cross-examination and rebuttal of witnesses against him as an essential part of due process of law under that Amendment.

X

Such majority opinions of this Court, however, do not in reality hold that the fact that certain rights are specifically enumerated in the first eight amendments inevitably precludes them from inclusion within the term "due process of law" as used in the 14th Amendment. In this respect such majority opinions distinguish between, and enumerate, such rights as are "so rooted in the traditions and conscience of our people as to be ranked as fundamental", and those which are not.[18]

It is particularly to be noted, in this respect, that in *Twining* v. *New Jersey*, 211 U. S. 78, 113, this Court says:

> "Salutary as the principle (the right against self-incrimination) may seem to the great majority, *it cannot be ranked with the right to hearing before condemnation* * * *." (italics and matter in parenthesis supplied)

B. *To Hold That the Probation Provisions of the Statutes of New York, Here Involved, Are Repugnant to the 14th Amendment When Applied to Deprivation of Life, Will Not Necessarily Invalidate Such Provisions If Confined to the Proper Scope of Probation Laws, the Deprivation of Liberty.*

Moreover, Such Probation Provisions Are Susceptible of a Practicable Construction, Consistent with Due Process of Law, Even Though Applied to Deprivation of Life as Well as of Liberty.

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[18] *Palko* v. *Connecticut*, 302 U. S. 319, 323-326; *Powell* v. *Alabama*, 287 U. S. 45, 65-68; *Twining* v. *New Jersey*, 211 U. S. 78, 99.

I

The proper scope of probation statutes is concerned with deprivation of liberty and not of life, and such statutes, moreover, are in their essence ameliotory. While the 14th Amendment provides that no person shall be deprived of either life or liberty without due process of law, in practical application the effect of the prohibition differs as between deprivation of life and deprivation of liberty.

II

In non-capital cases the function of a jury is ordinarily confined to the determination of guilt or innocence, and seldom, if ever, is concerned with the degree of punishment. In such cases the length of sentence lies entirely within the discretion of the judge, subject to such statutory limits as may be provided. While in such cases a judge may act on the basis of information obtained *ex parte* from probation reports or other sources, he seldom, if ever, discloses whether the sentence imposed is greater or less because of such information. In the absence of any statement to the contrary, since the purpose of probation statutes is ameliotory, the reasonable presumption is that the information so obtained has resulted in amelioration rather than aggravation of the sentence.

III

If in a particular instance, however, a trial judge in a non-capital case should expressly state that, had it not been for such *ex parte* information, he would have imposed a shorter sentence, the use of such *ex parte* information still *would not be the basis for depriving the accused of*

his liberty, since the jury's verdict of guilt, in itself, under any law, would presumably afford basis for some deprivation of liberty. Such *ex parte* information would be at most, therefore, the basis merely *for a greater degree of deprivation of liberty*, and conceivably, as such, might well be held not to come within the *literal* prohibition of the due process clause of the 14th Amendment. Even were it held otherwise, however, the use of such *ex parte* information, it would seem, would not necessarily invalidate the conviction, though it would invalidate the sentence.

IV

In a capital case, however, there obviously can be no degrees of deprivation of life—a man is deprived of his life or he isn't. Here, therefore, is no mere case of a trial judge simply imposing *a greater degree of punishment* based upon information obtained *ex parte*. It is a case where a judge on the basis of information obtained *ex parte* has imposed a *fundamentally different character of punishment* than the jury found, and the judge concedes, would have been justified by the evidence of witnesses before the jury, as to whom appellant had been afforded the right of cross-examination and rebuttal. It is therefore a case in which the appellant, under the authority of the statutes of the State of New York, as construed by the Court of Appeals of that State, would be deprived of his life contrary to the *literal* provisions of the 14th Amendment, unless it here be held that cross examination and rebuttal of witnesses furnishing the information on which alone such deprivation is concededly based, is no part of due process of law under that Amendment.

V

This Court is of course bound by the construction placed by the Court of Appeals of the State of New York on the statutes of that State here in question, including the probation provisions of those statutes embodied in Section 482 of the Code of Criminal Procedure of that State. This Court, however, might well point out to the Court of Appeals that if such probation provisions, as now construed, be held repugnant to the 14th Amendment when applied to capital cases, their constitutionality can be preserved as to non-capital cases by the more limited constructions here suggested under (1), and even as to capital cases, by that suggested under (2), *infra*.

(1) By confining the application of such probation provisions to what would seem the proper scope of probation laws, the regulation of deprivation of liberty. In such case, as already pointed out, such provisions would not necessarily be repugnant at least to the literal provisions of the 14th Amendment.

(2) If such probation provisions, however, must be construed to extend to deprivation of life, they can be still construed consistently with the provisions of the 14th Amendment, by requiring the judge in using the information which he is required or permitted to consider as a basis of sentence, to give the accused notice that such use is to be made, and a fair hearing in connection therewith,[19] i.e., the right to cross examine any witness furnishing such information and to offer evi-

[19] *Cf. Fleenor* v. *Hammond*, 116 Fed. (2d) 982. See also Assignment of Error No. 2, *ante*, p. 13.

dence in rebuttal, not only of such witness, but of probation records, etc.

VI

The Court might well point out, also, that in fact no choice need necessarily be presented between preserving the constitutional rights of an accused under the 14th Amendment and destroying the effectiveness of the New York probation statute.* That, however, if such choice were presented, there necessarily could be but one answer to it—that is, that constitutional rights must be superior to effective probation regulations.

VII

The State statutes here involved are clearly distinguishable from the so-called "repeated offender" statutes, the validity of which have been upheld by this Court in,

*The provisions of Section 482 of the Code of Criminal Procedure of the State of New York, here involved, read in this respect as follows:

> "Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant."

It is to be noted that while the judge *is required* before pronouncing sentence to have submitted to him any reports that may have been made as a result of mental, psychiatric or physical examination of defendant, and *is permitted* to use any information which will aid the court in determining the proper treatment of the defendant, *there is nothing in the statute itself which requires* that this be done *ex parte*, although the Court of Appeals has construed the statute as so *permitting*.

among other cases, *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *West Virginia*, 224 U. S. 616; and *Carlesi* v. *New York*, 233 U. S. 51. The validity of such "repeated offender" statutes, as there shown, rests on the actual existence and proof of prior convictions. Here the record shows (R. 2), without contradiction, that appellant had never been previously convicted of any crime. Moreover, that none of the alleged prior crimes of which the trial judge, on the basis of *ex parte* accusations, avowedly concluded appellant was guilty and avowedly, on the basis of such conclusion, sentenced appellant to death, were such that, had the appellant been convicted of any of them, he would have been subject to capital punishment. (R. 15-20)

VIII

Finally, it is to be pointed out that the logic of the upholding by this Court of the New York statutes here involved as not repugnant to the 14th Amendment to the Constitution of the United States, would be to hold that any person in the United States, citizen or not, may, without denial of due process of law, be deprived of his life by a judge on the evidence of witnesses with whom such person has not been confronted and as to whom he has been afforded no right of cross-examination or rebuttal, even though a jury has refused to deprive the same person of his life on the basis of evidence of witnesses with whom he has been confronted and as to whom he has been afforded the right of cross-examination and rebuttal.

It is particularly to be pointed out that if this may be authorized by State statute in any State court without contravening the due process clause of the 14th Amendment, it follows that this may be authorized by a Federal

statute in any Federal court without contravening the due process clause of the 5th Amendment.*

Argument

Here this brief will discuss those matters which counsel for appellant conceive to be basic to appellant's case. As already noted, certain of these matters have been discussed to some extent under the foregoing "Reply to Suggestions of Members of the Court, etc.". As a preliminary to further consideration of such matters, and to consideration of others not there discussed, it is desired to call the Court's attention respectfully to the following:

First: The broad question here presented is whether, consistently with the 14th Amendment, a State may deprive any person of his life, through *any agency of the State at any point in judicial proceedings;* on the evidence of witnesses as to whom such person has been afforded no right of cross examination or rebuttal, or even such limited confrontation as is essential for those purposes. The particular question here, is whether the State of New York

*It is of course true, as shown by the opinion of Mr. Justice Frankfurter, in *Andres* v. *United States* (333 U. S. 740, 754), that unlike the statutes of New York, the present Federal statutes, and those of many states, make the jury's recommendation of life imprisonment, in connection with an otherwise capital offense, mandatory upon the Judge. It is further to be noted that it is there assumed that this is the proper construction of the New York statutes here involved. As already noted, however, the Court of Appeals of New York in the case of *People* v. *Cole*, 285 N. Y. 838, has construed the statutes of that State as not making the jury's recommendation mandatory upon the judge. The point is that those Federal and state statutes which now do make the jury's recommendation mandatory may, of course, be modified in this respect.

can do so by undertaking by statute to confer such power on the judge of the court before whom such person is tried, as an incident to determining sentence. It may be conceded that if a State can do this *through any agency* or at *any point during judicial proceedings*, it can do as the State of New York has here undertaken to do.*

Second: It would seem undeniable that both the basic and the particular questions thus presented are substantial

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*Here, perhaps, is as good a place as any to dispose of two contentions which otherwise might be made by the appellees:

(1) That had the trial Judge in the case at bar in fact based his disregard of the jury's recommendation of life imprisonment and sentenced appellant to death, in exactly the same manner and on exactly the same *ex parte* information as he avowedly here did, *but had omitted such avowals and made no such disclosure of the basis upon which he undertook to deprive appellant of his life*, there could have been no contention here that thereby appellant would be deprived of his life without due process of law under the 14th Amendment to the Constitution of the United States. The obvious answer is that, while under such circumstances the contention might still have been made, it could not have been proved, while here it not only can be made, but can be and is proved.

(2) That, as shown by the "Proceedings On Sentence" (R. 4-20), both appellant and his counsel were present when the trial judge detailed the manner in which he had obtained such *ex parte* information, and avowed it to be the basis upon which he undertook to disregard the jury's recommendation of life imprisonment and to sentence appellant to death. That, nevertheless, neither appellant nor his counsel made any objection, or any demand for the right to cross-examine the witnesses from whom such information had been obtained, or to rebut either their testimony or the record evidence furnished by probation reports, etc. Again, the answer is obvious. Any such objection or demand would have been futile, since the trial judge, in so acting, did exactly what the Court of Appeals has expressly construed the statutes of the State of New York as authorizing him to do.

ones. No better authority for this could be invoked than what has already been quoted from the majority decision in *Twining* v. *New Jersey*, 211 U. S. 78, 113, and which is here repeated. There, the majority said:

> "Salutary as the principle (the right against self-incrimination) may seem to the great majority, *it cannot be ranked with the right to hearing before condemnation* * * *." (Italics and matter in parenthesis supplied.)

Had the majority, not only in the *Twining* case, but in *Adamson* v. *California*, 332 U. S. 46, confined their decision to what would seem to have been the more limited constitutional question necessarily presented in those cases, instead of undertaking to decide the broader constitutional question actually passed upon, the force of the foregoing quotation from the *Twining* case would have been even greater.

That more limited question was whether State statutes authorizing a judge and prosecutor to comment upon, and a jury to consider, the failure of a defendant in a criminal case to take the stand, are necessarily equivalent to compelling self incrimination, and, even if not, whether they nevertheless constitute a denial of due process of law under the 14th Amendment.

In the *Twining* case, the only question necessarily presented was the validity under the 14th Amendment to the Constitution of the United States, of a state statute which permitted a judge to comment, in his instructions to the jury, on the failure of a defendant to take the stand. There the judge expressly cautioned the jury that while such failure might be considered, it could not be taken as necessarily an admission of guilt (pp. 82, 83).

In the *Adamson* case, the appellant was convicted of a charge of first degree murder on an information which included charges of former convictions for burglary, larceny, and robbery, which former convictions his answer admitted. Both the Constitution and the Criminal Code of California expressly provide that no defendant in a criminal action may be compelled to be a witness against himself. (See footnote pp. 48, 49 of *Adamson* case). As there appears the Constitution, however, provided that:

> "* * * in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the Court and by counsel, and may be considered by the Court and by the jury * * *".

As also there appears the Penal Code provided that if a defendant in a criminal case,

> "* * * offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

The majority opinion (pp. 50, 51) obviously assumes that such statutory provisions amount to a requirement of self-incrimination. This assumption, it is respectfully submitted, seems unjustified. It may very well be, as both the concurring opinion of Mr. Justice Frankfurter (pp. 60, 61) and the dissenting opinion of Mr. Justice Murphy (p. 124), concurred in by Mr. Justice Rutledge, point out, that these statutes faced the defendant in that case with the dilemma of

taking the stand and subjecting himself to cross-examination as to his prior convictions, or of failing to take the stand and subjecting himself to comment by the judge and the prosecutor, and to consideration by the jury, of his failure to do so, as evidence of guilt. As pointed out, however, by Mr. Justice Black in his dissenting opinion (pp. 68, 69) such right of comment by the judge and the prosecutor is not necessarily the equivalent of self-incrimination.

This would seem plainly to be so, since whether a judge or prosecutor in a criminal case is or is not allowed to comment on the failure of the defendant to take the stand, or whether a jury is specifically authorized by statute to consider his failure to do so, it is inevitable that, with or without specific statutory authority, the jury will, nine times out of ten, give consideration to such failure as at least some evidence of guilt.

In other words, it cannot with certainty be said, either in the *Adamson* case or in the *Twining* case, that the statutory authority for comment on, and consideration of, the defendant's failure to take the stand, was the basis for the jury's conclusion of guilt, since the jury might have reached that conclusion without any such statutory authority, or action under it.

Certainly if the constitutional question necessarily involved in both the *Twining* case and the *Adamson* case was, instead of the broader right against self-incrimination, the more limited right of the accused to be protected against comment of the judge or prosecutor or consideration by the jury of failure of the accused to take the stand, that more limited right, even more clearly than the broader right against self-incrimination, *cannot be ranked with the "right to hearing before condemnation"*.

Under either aspect of those cases, therefore, it becomes pertinent to inquire what are essential elements of the "right to hearing before condemnation". In other words, does that right, as part of due process of law under the 14th Amendment, include as essential elements, the right of an accused in a capital case to cross examination and rebuttal of witnesses against him and to such confrontation as is necessary for such purposes, where, as here, the information obtained from such witnesses is the sole basis upon which it has been undertaken to deprive the accused of his life? If "the right to hearing before condemnation" does include these elements as essential to due process of law, it seems clear, under the majority decision in the *Twining* case itself, that the validity of the New York statutes here in question cannot be upheld.

This Argument will, therefore, be essentially directed to the following propositions:

(1) Due process of law under the 14th Amendment includes as indispensable elements in a capital case, the right of a defendant to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

(2) Since such rights are essential elements of due process of law under the 14th Amendment, a defendant in a capital case is entitled to be protected in them against *any agency* of the State authorized to deprive him of his life, and *at the point* at which such deprivation is authorized and undertaken.

(3) Where, as here, the statutes of a State authorize the trial judge in a capital case to disregard the jury's recommendation of a life sentence and to sentence an accused to death, such statutes must also require that the trial judge observe such rights *in connection with*

***such sentence of death*, if such rights are to have any substantial meaning *at the only point* at which the State has, in fact, undertaken to deprive appellant of his life.**

(4) The statutes of the State of New York, here involved, are therefore repugnant to the due process clause of the 14th Amendment, since the Court of Appeals of that State has construed such statutes as authorizing the trial judge, *on sentence*, to deprive appellant of his life on the basis of information obtained by the judge after verdict, from witnesses as to whom appellant was afforded no right of cross examination or rebuttal, nor the confrontation necessary for such purposes.

It would seem improbable that any serious contention will be made that the term "due process of law" as used in the 14th Amendment does not include, as indispensable elements in a capital case, the right of an accused to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

While, however, it will probably be conceded that such rights are indispensable to due process of law under the 14th Amendment *prior to the verdict of the jury*, it may, nevertheless, be contended that they are not indispensable in connection with information obtained by a judge *after verdict, as a basis for sentence*, under the authority of probation statutes such as Section 482 of the Code of Criminal Procedure of the State of New York.

Such a contention would, of course, contravene the repeated decisions of this Court cited in footnote[9] and footnote[10] at page 17 of this brief, that an accused is entitled under the 14th Amendment to be protected against deprivation of life without due process of law, *by any agency of a State*, and *at every stage of judicial proceedings*, including the sentencing by a judge.

What, however, is even more fallacious in such a contention here, is, that assuming such rights are indispensable elements of due process of law under the 14th Amendment, such a contention would deprive appellant of his life without protection of those rights against the only agency by whom, and at the only point at which, such deprivation has been undertaken in this case,—by the trial judge on sentence.

Let there be no mistake as to this. Here, under the authority of the statutes of the State of New York, the jury had refused to deprive appellant of his life on the basis of testimony of witnesses before the jury, as to whom appellant was accorded the right of cross-examination and rebuttal, and the confrontation necessary for those purposes. Here, the trial judge implicitly concedes that such refusal of the jury to deprive appellant of his life on the basis of the testimony so before them was justified. Under the authority of the same statutes, however, the trial judge has undertaken, on sentence, to deprive appellant of his life, not on the basis of such testimony before the jury, but solely on the basis of information received by such judge, after verdict, from witnesses as to whom appellant was accorded no such rights.

Obviously, therefore, if the express provision of the 14th Amendment, "* * * nor shall any State deprive any person of life * * * without due process of law", is to have any substantial meaning in this case, it must here be applied at the point where such deprivation of life has here been undertaken, that is, on sentence by the judge, and not on verdict by the jury. The statutes of the State of New York, in failing to afford such protection at the actual point at which the deprivation of appellant's life has been authorized by

them, and undertaken by the trial judge, would seem therefore clearly repugnant to the due process clause of the 14th Amendment.

It remains, therefore, to determine whether the term, "due process of law", as used in the 14th Amendment, includes, as indispensable elements, the right of a defendant in a criminal proceeding to cross-examine and rebut the testimony of witnesses against him, and to such confrontation by such witnesses as is necessary for such purposes. There would seem to be but one answer possible to that question under the decisions of this Court, and that is, that such rights are indispensable elements of due process of law under the 14th Amendment.

Before, however, referring to the specific decisions of this Court so holding, it is interesting to note that this Court apparently has had infrequent occasion to express a specific opinion on this subject, and that this is undoubtedly due to the fact that the inclusion of such rights within the meaning of "due process of law" under the 14th Amendment has been so generally recognized and observed, that there has seldom been violation of them. Indeed, as will subsequently be pointed out, these rights are the very basis of the Hearsay Rule.

It is further to be pointed out that the reason this Court has never previously had occasion to consider such rights in connection with the basis upon which a trial judge has undertaken, under authority of either Federal or State statutes, to disregard the recommendation of a jury of a life sentence, is that, with the exception of four States, the statutes of all States, as well as those of the United States, which confer power upon the jury to make such recom-

mendation, make such recommendation mandatory upon the judge.* Furthermore, it is believed that counsel for appellees will concede that in the State of New York, which is among the four States in which the jury's recommendation is not made mandatory upon the trial judge, the jury's recommendation has never been ignored, other than in the present case, except in three instances, and that one of these involved this same trial judge.

Without undertaking an exhaustive citation of the decisions of this Court recognizing that the term "due process of law", as used in the 14th Amendment, includes as indispensable elements in any case involving the deprivation either of life or liberty, the right of the defendant to cross examination and rebuttal of the witnesses against him, and to such confrontation as is necessary for these purposes, it will suffice to refer to the express holding to this effect in the Court's recent decision, *In re Oliver*, 333 U. S. 257, and to the Court's assumption to the same effect in its earlier decision in *Snyder v. Massachusetts*, 291 U. S. 97.

In the *Oliver* case, the Court said, p. 273:

> "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself

*See concurring opinion of Mr. Justice Frankfurter in *Andres v. United States*, 333 U. S. 740, 758. As there shown, a jury's recommendation of life imprisonment is not mandatory on the trial court only in the States of Delaware, New Mexico and Utah. To these three States, however, must be added a fourth, the State of New York. In *People v. Cole*, 285 N. Y. 838, the Court of Appeals of New York has held that the recommendation of life imprisonment in a felony murder case, authorized by Sections 1044, 1045 and 1045-a of the Penal Laws of the State of New York, is not binding upon the trial judge, but that the trial judge has discretion to disregard the jury's recommendation and to sentence a defendant to death.

> against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; *and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.*" (Italics supplied.)

It is true that the *Oliver* case did not involve a criminal proceeding, but a contempt proceeding; and that, as shown in the portion of the Court's opinion immediately following the foregoing quotation, the State of Michigan conceded that had the case been a criminal one, Oliver would have been entitled, under due process of law, to cross-examine the witnesses against him and to offer testimony in rebuttal. The State contended, however, that such rights do not inhere in a commitment for contempt as to which, ordinarily, the powers of the court are plenary. It is all the more significant, therefore, that this Court held that such rights do inhere even in a commitment for contempt.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, this Court had previously said, page 106:

> "Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in Federal courts (citing case), and in prosecutions in the state courts is assured very often by the constitutions of the states. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held (citing cases). *Hopt* v. *Utah*,

110 U. S. 574, has been distinguished and limited (citing cases).*

At page 114 of the same case:

> "A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel (*Powell* v. *Alabama*, 287 U. S. 45), and cross-examine his accusers. (citing cases)."

It will thus be observed that what was at least conceded or assumed by the Court in the *Snyder Case, supra*, in this respect, has been unequivocally affirmed by this Court in the *Oliver* case, *supra*.

There would seem to be no warrant for burdening the Court with detailed references to those decisions in which it has repeatedly recognized that due process of law under the 14th Amendment includes the right to notice of hearing and a fair opportunity to be heard and to defend. (See cases cited in *Twining* v. *New Jersey*, 211 U. S. 78, pp. 111-112; see also footnote, p. 273 in *Re Oliver, supra*). Neither would it seem necessary to refer in detail to those decisions

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*It may be well to note that none of the cases cited by the Court in reality throw any doubt on the right of an accused in a criminal case to cross examination and rebuttal of witnesses against him, and to such confrontation as is necessary for those purposes. Neither do they modify or distinguish the *Hopt* case in so far as that decision requires strict adherence to the hearsay rule "where life or liberty are at stake", subject only to the established exceptions to that rule. The cases cited merely represent either (1) situations where the presence of the accused at some stage of the proceedings was not in reality necessary to the effective protection of such rights, or (2) established exceptions to the hearsay rule permitting the use of testimony by witnesses in prior proceedings, or in part of the same proceedings, which originally had been subjected to cross examination by the accused.

of the Court which hold, in substance, that what due process of law under the 14th Amendment does require,

> "* * * is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions * * *." *Hebert* v. *Louisiana*, 272 U. S. 312, p. 316.

See to the same effect, *Palko* v. *Connecticut*, 302 U. S. 319, p. 328.

The only further reference to an expression of the Court in this respect, therefore, which will here be made, is to its holding in the *Snyder* case, *supra*, p. 105, that State action, to be consistent with due process, must not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".

In connection with this statement of the Court in the *Snyder* case it is desired to refer to what is said in Wigmore on Evidence Vol. V (Third Edition), Sec. 1367. It is there said:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in our lengthening experience.
>
> Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value.

It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

At Section 1362 *idem.* it is stated:

"Theory of the Hearsay Rule. The fundamental test, shown by experience to the invaluable, *is the test of Cross-examination.* The rule, to be sure, calls for two elements, Cross-examination proper, and Confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable."

It is further stated at Section 1365 *idem.*:

"Now Confrontation is in its main aspect, *merely another term for the test of Cross-examination.* It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential."*

Counsel for appellant believe further argument is neither necessary nor warranted to establish that due process of law under the 14th Amendment includes, as indispensable elements, the right of an accused in a capital case to cross examination and rebuttal of the testimony of witnesses against him, and to such confrontation as is essential for those purposes.

There is, however, one other recent decision of this Court to which counsel feel reference should appropriately be made, though it is applicable rather to the general char-

*Capitals and italics in all these quotations are Wigmore's.

acter of the proceedings on sentence in appellant's case, on the basis of which the trial judge undertook to deprive appellant of his life, rather than to the specific question of appellant's right to cross examination and rebuttal of the testimony of witnesses against him, as part of due process of law under the 14th Amendment.

In *Townsend v. Burke*, 334 U. S. 736, the defendant had been convicted in the State Court of Pennsylvania of burglary and robbery. He had been held incommunicado for a period of forty hours after his arrest and had not been offered or advised of his right to assistance of counsel. In imposing sentence the Court, either through misinformation or mis-reading the record, acted in determining the severity of the sentence to be imposed, on certain assumptions concerning his criminal record which were materially untrue. The Court said (pp. 740-741):

> "Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. *Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.*
>
> We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus. *It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had*

no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." (Italics supplied)

There would seem to be a striking parallel between the basic grounds on which this Court condemned the conduct of the trial judge *on sentence* in the *Townsend* case and the grounds on which it is submitted the conduct of the trial judge *on sentence* in this case should be condemned, particularly since here such conduct has been held by the Court of Appeals of New York to be authorized fully by the statutes of that State, here involved. If the statutes of New York, authorizing such conduct on sentence, are here to be upheld as not repugnant to the 14th Amendment, it means that it is immaterial whether sentence is pronounced "on a foundation * * * extensively and materially false", since under those statutes an accused may be denied, as here, any opportunity for determining those very facts. Moreover, so construed, those statutes certainly require no such

"scrupulous and diligent search for truth", as under the *Townsend* case, might prevent a merely erroneous judgment under them from constituting a denial of due process of law.

Finally, counsel for appellant feel it only fair to say that, assuming the Court of Appeals erred in its decision that the statutes in question, so construed, are not repugnant to the 14th Amendment, a large share of the responsibility for any error in this respect rests with counsel. At the time counsel raised such constitutional questions in that Court, counsel had not had the opportunity for the more mature consideration which it has since been possible to give them, and, therefore, were unable to present as full a discussion of them as they have here undertaken. Indeed, at the time counsel first approached this Court, they were scarcely in better position, and so far as a more substantial showing may here be made in support of their contentions in these respects, it is in no small measure due to the benefit which counsel were afforded through discussions with various members of the Court.

More mature consideration, however, has served only to confirm counsels' first impression that the implications inherent in upholding the validity of the State statutes here involved, may well go far beyond their application to this particular case. In counsel's opinion, nothing could afford those at home and abroad, who charge that our democratic institutions are a fraud and a delusion, better ammunition for their propaganda, than to be able to say, and to say truthfully, that the Constitution of these United States is powerless to protect any person within them, from being deprived of his life by any State choosing to do so, on the testimony of witnesses with whom he has never been confronted and on the basis of documents he has never seen,

and without any cross-examination or rebuttal of such witnesses and documents, provided only that such State chooses as its agency and as its point of deprivation, a judge on sentence, instead of a jury on verdict.

CONCLUSION

Appellant respectfully submits that the judgment of the Court of Appeals of the State of New York, here appealed from, affirming the judgment of the County Court of Kings County and the sentence of death thereunder, should be reversed, and any sentence of death thereunder should be set aside and prohibited, since such judgment and sentence are based on a construction of the statutes of the State of New York here involved, which makes those statutes repugnant to the due process clause of the 14th Amendment to the Constitution of the United States.

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APPENDIX A

Verbatim Quotations of Sections of the Penal Laws of the State of New York Here Involved.

§ 1044. *Murder in first degree defined*

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

* * *

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;

§ 1045. *Punishment for murder in first degree*

Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a.

§ 1045-a. *Life imprisonment for felony murder; jury may recommend*

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life.

Verbatim Quotation of the Section of the Code of Criminal Procedure of the State of New York Here Involved:

§ 482. *If no sufficient cause shown, judgment to be pronounced*

If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered. Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.